
Current Ethical Problems in Advising Clients

by Randall W. Roth

I. Ethics

A. The nature, source, and purpose of ethics.

1. A dictionary definition of "ethics" is "a system of moral principles." *The Random House Dictionary of the English Language* (1967). "Moral" is something "of, pertaining to, or concerned with right conduct or the distinction between right and wrong." *Id.* Together, ethics is a system of principles that is concerned with right conduct.

a. Lawyers are not alone in their interest in ethics.

b. Every person, whether knowingly or unknowingly, develops and constantly refines a private system of ethics.

c. "[T]he rules governing the legal profession are not about morality as much as they are guidelines and prohibitions that regulate the practice of law and, as such, are as susceptible to learning as the Internal Revenue Code or a local probate practice." Pennell, "Professional Responsibility: Reforms are Needed to Accommodate Estate Planning and Family Counseling," 25 U. Miami Inst. on Estate Planning, Ch. 18 (1991) (Hereafter, "Pennell").

2. Almost every jurisdiction has an explicit code or set of rules governing professional ethics for lawyers. See II below.

a. Yet oftentimes, and particularly in relation to estate planning, no rule will explicitly govern a particular situation or set of circumstances. *Developments Regarding the Professional Responsibility of the Estate Planning Lawyer: The Effect of the Model Rules of Professional Conduct*, 22 Real Prop., Prob. & Trust J. 1-2 (1987) (Hereafter "Developments"). See also, *Developments Regarding the Professional Liability of the Estate Administration Lawyer; The Effect of the Model Rules of Professional Conduct*, ABA Committee on Significant New Developments in Probate and Trust Law Practice (A-4) (11/29/90); Avery, *The Rules of Professional Conduct for Lawyers Are Confusing*, Trusts & Estates (April 1992); Pennell, *supra*, ¶ 1801.

b. "...model ethics rules do little to instruct the [estate] planner: they assume the existence of either an active transaction between two parties or litigation between two parties. They also assume that the identity and interests of each client are

clear. In most cases they fail to serve the [estate] planner." Hilker, 37th Annual Seattle Estate Planning Seminar, Chapter 1A (1992) (Hereafter "Hilker").

c. "In large measure the duties of trusts and estates lawyers are defined in many states by opinions rendered in malpractice actions, which provide incomplete and insufficient guidance regarding the ethical duties of lawyers." *ACTEC Commentaries on the Model Rules of Professional Conduct*, 1993, Reporter's Note (hereafter "ACTEC Commentaries").

d. If no rule governs a particular situation, does this mean there is no ethical requirement? If there is an ethical requirement, from whence does it spring?

e. "...a lawyer is also guided by personal conscience and the approbation of professional peers." *Preamble to ABA Model Rules of Professional Conduct*, 1983.

3. Why has the legal profession developed its own rules of ethics? An economic argument can be made that in the long run adherence to ethical standards will maximize profits for the legal profession. Compare Johnston, *An Ethical Analysis of Common Estate Planning Practices—Is Good Business Bad Ethics?*, 45 Ohio St. L.J. 57 (1984). If profit maximization is not the purpose of codified ethics, what is?

a. Are lawyers more concerned about morality than are others?

b. Do lawyers need explicit rules of morality more than others?

c. Is a code of ethics for lawyers intended to be something more than (or other than) rules of morality? "Case law recognizes that ethics rules are meant to instill public confidence in the lawyer." See, e.g., *Jeffrey v. Pounds*, 67 Cal. App. 3d 6, 11 (1977), Hilker, *supra*, p. 5.

d. Does a code of ethics reduce the number of lawsuits against lawyers? See Johnston, *Avoiding Malpractice Liability in the Estate Planning Context*, 43 USC Law Center Tax Inst. ¶ 1700 (1991) and Begleiter, *Attorney Malpractice in Estate Planning—You've Got to Know When to Hold Up, Know When to Fold Up*, 37 Kan. L. Rev. 193 (1990).

e. "Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached." *ABA Model Rules of Professional Conduct*, "Scope" ¶ 6, 1983.

f. "The Rules are designed to provide

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guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability." *ACTEC Commentaries*, *supra*, Reporter's Note.

B. As a practical matter, a lawyer who violates a written ethical standard may be a "sitting duck" in a malpractice or tort liability lawsuit. Bruce, *Ethics in Estate Planning and Estate Administration*, 15 Probate Notes 118, Fall, 1989.

1. "Disappointed beneficiaries are increasingly positing their malpractice claims on alleged violations of ethic code provisions..." Johnson, *Estate Planning Malpractice—Trap for the Unwary*, ABA Tax Section, Estate & Gift Tax Committee Meeting, May 16, 1992 (Hereafter, "Johnson").

2. Other "sanctions" are possible as well. "...we hold that an attorney who violates our rules of professional conduct...may receive neither executor's nor legal fees for services he renders an estate." *Estate of McCool*, 553 A2d 761, 769 (NH 1988).

C. Lawyers engaged in estate planning frequently have competing responsibilities, the specifics of which are not always clear.

1. The authors of one particular article described estate planners as facing a "three-pronged dilemma":

[Conflicting interests] create problems for the lawyer who must meet his or her legal responsibilities to the client by explaining all the alternatives and their potential outcomes, while also meeting his or her ethical responsibility to avoid having the recommendations to one client affect the interests of another client, as well as satisfying the moral obligation of assisting the client in choosing the "best" choice for the client's particular situation.

Adcock and Valentine, *The Estate Planner's Dilemma: Reconciling Legal, Ethical and Moral Responsibilities*, Fla. Bar J., (Jan. 1986).

2. The authors of a text designed primarily for tax lawyers talk about the lawyer's obligation to "the system" ["an imprecise concept blending together notions of society, the profession, and the law"]:

Ordinarily, in performing his duty to the client, the lawyer carries out his duty to the system as well. There are times, however, when the lawyer, while pursuing his client's interests competently, loyally, and discreetly, must hold himself and his client's interests in check in order to perform the less defined, seemingly contradictory duty which he owes to the system as a whole.

Wolfman and Holden, *Ethical Problems in Federal Tax Practice*, 2d ed., The Michie Company,

Charlottesville, Virginia, 1985, p. 1.

3. But, another scholar defends a lawyer's freedom to represent a client free from the "universalizing claims of morality":

I will argue in this essay that it is not only legally but also morally right that a lawyer adopt as his dominant purpose the furthering of his client's interests—that it is right that a professional put the interests of his client above some idea, however valid, of the collective interest.

Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976).

II. Specific Rules

A. The American Bar Association (ABA) has two sets of model standards of professional ethics in current use among the various jurisdictions, the Code of Professional Responsibility (Model Code) and the Rules of Professional Conduct (Model Rules). The ABA does not enforce either. Lawyers' professional conduct is regulated and enforced by states, which generally follow either the Model Code or Model Rules.

1. The Model Code was adopted by the ABA in 1969 pursuant to a perceived need for change in the profession's ethical code. The original set of ethical standards released by the ABA had been adopted in 1908 and contained 32 Canons of Ethics. These 32 canons had grown in number to 47 by the early 1960s, but were still quite brief and considered inadequate. See, G. Hazard & D. Rhode, *The Legal Profession: Responsibility and Regulation* 99-100 (1988). The Model Code reduced the number of canons to nine, but included under each a set of Ethical Considerations and Disciplinary Rules. The Model Code was eventually adopted by nearly every state in the union. *Id.* at 100.

2. The content and structure of the Model Code came under much attack in the years after its adoption. Also, events of the 1970s such as Watergate and Supreme Court decisions on advertising and solicitation focused the profession's and the public's attention on the professional ethics of lawyers. *Id.* The ABA began another examination of its model ethical standards and in 1983 adopted the Model Rules.

3. The Model Rules follow a Rules and Commentary format similar to the ALI Restatement of Laws rather than the more complicated system of Canons, Ethical Considerations, and Disciplinary Rules employed by the Model Code. The Model Rules are gaining increasing acceptance among the states. *Developments, supra*, at 1.

4. By 1994, more than two-thirds of the States and the District of Columbia had adopted the Model Rules with some modification.

B. "[T]he Model Rules [as well as the Model Code,] do not deal effectively with some of the most important and most difficult problems of professional conduct in the practice of estate planning...." *Developments, supra*, at 1. *Developments* is a report submitted by the ABA Section of Real Property, Probate and Trust Law's Committee on Significant New Developments in Probate and Trust Law Practice.

1. Based on its examination of the Model Rules and a comparison of the Model Rules with the Model Code, the committee has recommended that a set of ethical standards be drawn up specifically for the areas of probate and trust practice. *Id.* at 2.

a. The ABA Special Probate and Trust Division Study Committee on Professional Responsibility has prepared *The Lawyer's Duties in Representing Husband and Wife*, 1992 (hereafter "Representing Husband and Wife"). It has been approved by both the Division Council and by the Council of the Section as a whole. While not an official interpretation of the law governing legal ethics, it has been offered as a "prescriptive guide" to the "serious ethics issues estate planners routinely face." See generally, Moore and Hilker, *Representing Both Spouses: The New Section Recommendations*, 7 Prob. & Prop. 26 (July/Aug. 1993).

b. The same group has also prepared *Counseling the Fiduciary*, 1993. It encourages the use of written agreements that set forth the duties of the lawyers and then provides guidance as to the "default rules" (i.e., the rules in the absence of an agreement to the contrary).

2. The American College of Trust and Estate Counsel ("ACTEC") has developed a set of commentaries that are intended to "fill the gap" by providing particularized guidance to trust and estate attorneys regarding their professional responsibilities. Copies may be purchased for \$9.50 per copy from ACTEC (3415 South Sepulveda Blvd. #460, Los Angeles, CA 90034. Telephone (310) 398-1888; Fax (310) 572-7280).

III. Application of Specific Rules

A. **Relationships.** Ethical standards specific to estate planning generally arise out of relationships between the estate planner and other parties. The most exacting of these standards result from the establishment of the attorney-client relationship. Price, *Professional Responsibility in Estate Planning: Progress or Paralysis?*, 1987 U. Miami Inst. on Est. Plan. 18-4 (1987).

1. [T]he probate, trust and estate planning practitioner is frequently found in a

thicket of multiple representations where the conflicts between the various parties' interests are subtle, pervasive, indirect, continuously shifting and, in many instances, even difficult to recognize. *Developments, supra*, at 2.

2. Although the term "client" is important in both the Model Code and the Model Rules, it is defined in neither. The "scope" section of the Preamble to the Model Rules, however, states that "[w]hether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact." See, *Developments, supra*, at 14-15.

3. The attorney-client relationship is contractual in nature. As with contracts generally, an express agreement is not necessary for formation. Rather, agreement may be implied from the circumstances. *Price, supra*, at 18-4. Indeed, the perceptions of the "client" may be given the most weight by a court. See, e.g., *In re McGlothlen*, 99 Wash. 2d 515, 522, 663 P.2d 1330 (1983).

B. **General Duties.** The estate planning lawyer has a number of duties in common with lawyers generally. Important among these are the duties of competence, diligence, communication, and confidentiality.

1. *Competence.*

a. Rule 1.1 of the Model Rules states: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

b. DR 6-101 of the Model Code states: (A) A lawyer shall not: (1) handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it; (2) handle a legal matter without preparation adequate in the circumstances; or (3) neglect a legal matter entrusted to him.

c. The comment to Rule 1.1, above, states that "[i]n many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances." One is left to guess whether estate planning is an area where expertise of some sort is required.

(1) One court has indicated that a generalist who undertakes legal work that should be referred to a specialist will be held to the same standard of care as the specialist. *Horne v. Peckham*, 97 Cal. App. 3d 404, 158 Cal. Rptr. 714 (1979).

(2) This standard—legal work that should be referred to a specialist—is not particularly helpful, especially in situations where the lawyer accepts employment in an area in which he or she is not currently qualified but expects to become qualified through study and investigation. Johnston, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 Iowa L.R. 629 at 684 (1982).

(3) On the other hand, one practitioner has suggested that the actual standard will surprise many:

While it may be assumed that the standard of care of a general practitioner may be less than that of the legal specialist, it is not necessarily true in practice. In my own observation, many times general practitioners who adequately prepare in a given area perform even better services than some who claim to be specialists. The general practitioner does not seem to suffer the legal myopia of the specialist and sometimes perceives other effects of a transaction or outcome more clearly. Kasten, *Attorney Malpractice in Illinois: An Early Chapter in a Book Destined for Great Length*, 13 J. Mar. L. Rev. 309, 316 n. 41 (1980).

d. According to the ACTEC Commentary on Model Rule 1.1:

The fact that a lawyer does not precisely assess the tax or substantive law consequences of a particular transaction does not necessarily reflect a lack of competence. In some instances the facts are unclear or disputed, while in others the state of the law is unsettled. In addition, some applications of law and determinations of facts made by courts or administrative agencies are not reasonably foreseeable. In other instances the complexity of a transaction or its unusual nature generate uncertainties regarding the manner in which it will be treated for tax or substantive law purposes and may prevent an otherwise thoroughly competent lawyer from accurately assessing how the transaction would be treated for tax or substantive law purposes.

2. Diligence.

a. Rule 1.3 of the Model Rules states: “A lawyer shall act with reasonable diligence and promptness in representing a client.”

b. As noted above, DR 6-101(A)(3) of the Model Code states that a lawyer shall not “[n]eglect a legal matter entrusted to him.” Diligence also falls under Canon 7 of the Model Code which instructs that “[a] lawyer should represent a client zealously within the bounds of the law.”

c. The comment to Rule 1.3, above, contains some statements applicable to estate planners.

The comment states that “[a] lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer.” Also, the comment notes that “[p]erhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions.” Most clearly, a client will be adversely affected if she dies before her lawyer completes her estate plan.

d. The ACTEC Commentary on Model Rule 1.3 suggest that the lawyer and client establish a timetable for completion of various tasks. It also cautions against “the imposition of time limits that may prevent the lawyer from consulting fully with the client or giving a matter the time and attention it should receive. The lawyer should caution the client regarding the risks that arise if a matter is pursued on an abbreviated time schedule that deprives the lawyer of the opportunity fully to fulfill the lawyer’s role.”

3. Communication.

a. Rule 1.4 of the Model Rules states:

“(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”

b. The duty of communication is fragmented in the Model Code. The Model Code Comparison included in the Model Rules notes that DR 6-101(A)(3), providing that a lawyer shall not “[n]eglect a legal matter entrusted to him,” DR 9-102(B)(1), providing that a lawyer shall “[p]romptly notify a client of the receipt of his funds, securities, or other properties,” EC 7-8, providing that a lawyer “should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations,” and EC 9-2, providing that “a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client,” are all relevant.

(1) The lawyer’s duty to communicate with a client during the active period of the representation includes the duty to inform the client reasonably regarding the law; developments that affect the client; and the progress of the representation. The lawyer for an estate planning client should attempt to inform a client to the extent reasonably necessary to enable the client to make informed judgments regarding major issues involved in the representation. ACTEC Commentary on Model Rule 1.4.

(2) The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. ACTEC Commentary on Model Rule 1.4.

(3) Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet, or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, the lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs. ACTEC Commentary on Model Rule 1.4.

c. The comment to Rule 1.4 notes that a problem may arise where the client is a child or suffers from mental disability. In such a case, communication might have to be different in form than communication with competent adults, or it might have to be with a guardian instead of the client directly. One issue left open is whether a lawyer for a fiduciary of an estate or trust may or must communicate directly with beneficiaries of that estate or trust. *See, Developments, supra*, at 5.

d. Rule 1.14 provides that when a client's ability to make adequately considered decisions is impaired, whether because of minority, mental disability or otherwise, the lawyer should maintain a normal client-lawyer relationship as far as reasonably possible, and should seek a guardian or other protection for the client only if necessary. If a minor or disabled client has no guardian, his or her lawyer may be under an obligation to act as *de facto* guardian. Comment to Rule 1.14.

4. Confidentiality.

a. Rule 1.6 of the Model Rules states:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based on conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

b. DR 4-101 of the Model Code protects information that falls under the attorney-client privilege, referred to as "confidences," and information "gained in the professional relationship" that the client asked to be kept secret or the disclosure of which would cause the client embarrassment or other harm, referred to as "secrets." The disciplinary rule prohibits lawyers from revealing confidences or secrets of their clients, from using such confidences or secrets to their clients' disadvantage, and from using such confidences or secrets to the lawyer's own or a third party's advantage without consent of the client after full disclosure. The disciplinary rule does allow the revelation of confidences or secrets (1) with consent of the client after full disclosure, (2) where permitted by the Model Code or required by law or court order, and (3) where necessary to collect the lawyer's fee, or defend against accusations of wrongful conduct. Also, a lawyer may reveal his or her client's intention to commit a crime and the information necessary to prevent the crime.

c. Perhaps the most difficult confidentiality problems for the estate planner, and those most unique to the estate planning area of practice, arise as a result of multiparty representation. Multiparty representation is very common in estate planning since clients often desire or request it for cost or other reasons. *Developments, supra*, at 18. The potential for conflicts in multiparty representation, however, is tremendous. See Subsection C, below. These conflicts can lead to confidentiality problems. For exam-

ple, if a lawyer is assisting a couple with their estate plan, one spouse might relay some information to the lawyer that he or she would like to keep secret from such other spouse, but which is material to the estate plan. Since the information is material to the estate plan, it is in the other spouse's best interest to know the information. Such situations should be avoided or representation of both spouses may have to be withdrawn.

(1) When the lawyer is first consulted by the multiple potential clients the lawyer should review with them the terms upon which the lawyer will undertake the representation, including the extent to which information will be shared among them. The principal terms should, but need not be, reflected in a writing a copy of which is given to each client. ACTEC Commentary on Model Rule 1.6.

(2) Unless otherwise agreed, a lawyer who represents multiple clients with regard to related legal matters is presumed to represent them jointly. Such a representation usually implies that information will be shared by the clients with respect to the subject of the representation but confidentiality will be maintained as to all others. ACTEC Commentary on Model Rule 1.6.

(3) There does not appear to be any authority that expressly authorizes a lawyer to represent multiple clients separately with respect to related legal matters. However, with full disclosure and the consent of the clients some experienced estate planners regularly undertake to represent husbands and wives as separate clients. Similarly, but with less frequency, some estate planners also represent a parent and child or other multiple clients as separate clients. A lawyer who is asked to provide separate representation to multiple clients should do so with great care because of the stress it necessarily places on the lawyer's duties of impartiality and loyalty and the extent to which it may limit the lawyer's ability to advise each of the clients adequately. ACTEC Commentary on Rule 1.6.

(4) [T]he lawyer and the fiduciary may agree between themselves that the lawyer may disclose to the beneficiaries or to an appropriate court action or inaction on the part of the fiduciary that might constitute a breach of trust. Whether or not the lawyer and fiduciary enter into such an

agreement, the lawyer for the fiduciary ordinarily owes some duties largely restrictive in nature to the beneficiaries of the fiduciary estate. The existence of those duties alone may qualify the lawyer's duty of confidentiality with respect to the fiduciary. In addition, the lawyer's duties to the court may require the lawyer for a court-appointed fiduciary to disclose to the court any acts of misconduct committed by the fiduciary. ACTEC Commentary on Model Rule 1.6.

C. **Conflicts.** The bulk of the ethics issues in the estate planning area arises from conflicts of interest. These conflicts can be roughly broken down into two classes—those between clients where there is multi-party representation and those between the lawyer and the client.

1. *Generally.*

a. Rule 1.7 of the Model Rules states:

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

b. The American Law Institute *Restatement of the Law*, Tent. Draft No. 4, *The Law Governing Lawyers* (1991) ("*Restatement*") takes a similar approach:

§ 201: Basic Prohibition of Conflict of Interest. Unless all affected clients consent to the representations under the limitations and conditions provided in § 202, a lawyer may not represent a client if the representation would constitute a conflict of interest. A conflict of interest exists if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, to a former client, or to a third person.

§ 202: (1) A lawyer may represent a client notwithstanding a conflict of interest prohibited by § 201 if each affected client gives informed consent to the lawyer's representation. Informed consent requires that the client have adequate information about the risks and advantages of such representation to that client.

(2) Notwithstanding each affected client's consent, a lawyer may not represent a client if:

(a) The lawyer represents an opposing party in the same litigation;

(b) One or more of the clients is legally incapable of giving consent; or

(c) Special circumstances render it unlikely that the lawyer will be able to provide adequate representation to one or more of the clients.

c. The Model Code contains similar provisions. DR 5-105(A) prohibits a lawyer from accepting employment "if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance...or if it would likely involve him in representing differing interests, except to the extent permitted under DR 5-105(C)." DR 5-105(C) provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." DR 5-101(A) prohibits a lawyer from accepting employment where his judgment "reasonably may be affected by his own financial, business, property, or personal interests."

2. *Conflicts between clients.*

a. Husband/Wife. It is common for an attorney to be approached by one spouse about doing an estate plan for both spouses. In such cases, the lawyer's contact will often be primarily with the spouse that first contacted him or her. If the lawyer is preparing wills or an estate plan for both, however, both are the lawyer's clients and both need to be treated as such. *Developments, supra*, at 10-11. There is a wide range of conflicts that can arise when a lawyer prepares an estate plan for spouses. "Many lawyers believe the better practice—though not itself required by the Model Rules [or Code]—is a written agreement...setting forth the ground rules of the representation at the outset." *Hilker, supra* at 9. In the *Developments* article, *supra*, the authors provide a list of situations that flag potential conflicts:

(1) Children by another marriage may lead to problems because the natural parent of the chil-

dren will often have a stronger desire to provide for them than his or her spouse.

(2) In community property states, determination of the status of property as community or separate is potentially divisive because of the differing rights such legal statuses provide.

(3) In community property states, the forced election whereby one spouse must forego his or her interest in the community property or else lose his or her right to take under the will is a naturally conflicting situation likely requiring full, impartial explanation to the electing spouse. Elective rights in noncommunity property states may cause a similar situation.

(4) Dispositions in trust, whereby the receiving spouse's rights in the property are limited to a degree, may give rise to conflicts. This is particularly so with the QTIP Trust since, if no interest in the principal is given to the surviving spouse, benefits from such a trust flow only to the first spouse to die.

(5) The choice of a trustee for the trusts set up for the surviving spouse's benefit may cause conflict.

(6) Disinheritance as an estate planning technique can cause conflict.

(7) Even when the initial estate plan goes smoothly, problems may arise in the future when one or the other spouse seeks to make a change in the plan.

(8) Drafting of pre- or post-nuptial agreements is an inherently adversarial exercise. In California, simply the fact that a surviving spouse was not represented by independent counsel at the time an agreement waiving marital rights was signed may be enough to nullify the agreement. Cal. Prob. Code § 146(e).

Other potentially divisive estate planning options are: selection of retirement plan options, gift-giving programs, and transfers of life insurance. Price, *supra*, at 18-12; Wade, *When Can a Lawyer Represent Both Husband and Wife in Estate Planning?* Probate & Property, March-April 1987; Tate, *Handling Conflicts That May Occur in an Estate Planning Practice*, 16 Estate Planning, pp. 32-37 (January-February 1989); Obegi, *Handling Conflict of Interest Problems in Estate Planning*, 13 Community Property Journal, pp. 46-72 (January 1987).

b. Parent/Child. Conflicts between parents and children can arise three ways: parents may overreach when engaging in estate planning involving a young or youthful child of theirs, children may overreach when engaging in estate planning involving an aged or infirm parent, or conflicts may arise even where both parties are competent adults. See, Price, *supra*, at 18-16, 18-17.

(1) Cases where parents have been found to overreach minor or youthful children often involve trusts or custodial funds. A parent may attempt to unduly restrict a child's access to funds, or may abuse his or her position as trustee or custodian by expending the child's funds for the parent's benefit. In such cases, if the child was not independently represented, the trust might be set aside. *Price, supra*, at 18-16, citing *Erdmann v. Erdmann*, 67 Wis. 2d 116, 226 N.W.2d 439 (1975) and *Jiminez v. Lee*, 274 Or. 457, 547 P.2d 126 (1976).

(2) Where aged or infirm parents are involved, the claim will generally be one of undue influence or fraud. If an aged parent is a client in an individual or family estate plan, the lawyer must discuss the plan with such parent independently, being held to the duty of loyalty that arises out of Rule 1.7 or DR 5-105. *Price, supra*, at 18-17. In one well known case, the Supreme Court of New Jersey held that representation of both child beneficiary and parent raised a presumption of undue influence "because the testator's attorney has placed himself in a conflict of interest and professional loyalty between the testator and beneficiary." *Haynes v. First National State Bank of New Jersey*, 87 N.J. 163, 432 A.2d 890 (1981).

(3) Where representation is simply multigenerational, with no incompetent parties, conflicts might still arise. The problems of restricted control of trust property, gift programs, and disinheritance, for instance, all are concerns of multigenerational planning. Additionally, business transactions necessary to an estate plan may cause problems because of their inherently adversarial nature, and a family business entity may be yet another possible client whose interests must be looked out for. *Price, supra*, at 18-17; and *Developments, supra*, at 13.

c. *Fiduciary/Beneficiary*. Representation of both a fiduciary and a corresponding beneficiary is problematic because of a fiduciary's duty to treat all beneficiaries impartially and to exercise discretion independent of the wishes of the beneficiaries. *Price, supra*, at 18-15. When an attorney represents just the fiduciary, however, he or she should make the beneficiaries aware that the scope of his or her duties does not include watching out for their individual interests, and that they need to secure independent counsel for this purpose. Failure to so inform them that they are responsible for protecting their interests may amount to malpractice. *Id.*, citing *Linck v. Barokas & Martin*, 667 P.2d 171 (Alaska 1983). Generally, acting as counsel or advisor to a fiduciary may result in a lawyer's owing fiduciary duties to the beneficiaries as well. *Price, supra*, 18-7, citing *Morales v. Field*, 99 Cal. App. 3d 318, 160 Cal. Rptr. 239 (1979) (trust);

Estate of Larson, 103 Wash. 2d 527, 694 P.2d 1051 (1985) (estate); Comment to Rule 1.14 of the Model Rules (guardianships and conservatorships).

(1) Conventional wisdom and case law seem to view the fiduciary as the sole client. *See, e.g., Goldberg v. Frye*, 217 Cal. App. 3d 1258 (1990); Michigan Judicial Ethics Comm. Op. R-10 (April 19, 1991). *See, e.g., Moore, Conflicting Interests in Post-mortem Planning*, 9 U. Miami Inst. Est. Plan ¶ 1900 (1975); Moore, *Conflicts in Post-Mortem Estate Planning After the Tax Reform Act*, 12 U. Miami Inst. Est. Plan. ¶ 105 (1978).

(2) But there seems to be growing support for the notion that derivative duties are owed to the beneficiaries. *See generally*, Hazard, "Triangular Lawyer Relationships: An Exploratory Analysis," 1 *Georgetown J. of Legal Ethics* 15 (1987); *Estate of Larson*, 694 P.2d 1051 (Wash. 1985). *See also*, Ethics Panel, "Who is the Client When You Represent the Fiduciary," paper presented at the fall meeting of The American College of Trust and Estate Counsel, October 9, 1992.

(3) Professor Pennell champions an entity approach whereby the lawyer must protect the interests of the beneficiaries as well as the fiduciary. *See, e.g., Pennell, "Representations Involving Fiduciary Entities: Who is the Client,"* paper presented at the fall meeting of The American College of Trust and Estate Counsel, October 9, 1992; N.Y. St. Ethics Op. No. 512 (1979).

(4) The ACTEC Commentary on Model Rule 1.2 distinguishes between representation in a "representative" capacity and "individual" representation:

If a lawyer is retained to represent a fiduciary generally with respect to the fiduciary estate, the lawyer represents the fiduciary in a representative and not an individual capacity—the ultimate objective of which is to administer the fiduciary estate for the benefit of the beneficiaries. Giving recognition to the representative capacity in which the lawyer represents the fiduciary is appropriate because in such cases the lawyer is retained to perform services that benefit the fiduciary estate and, derivatively, the beneficiaries—not to perform services that benefit the fiduciary individually. The nature of the relationship is also suggested by the fact that the fiduciary and the lawyer for the fiduciary are both compensated from the fiduciary estate. A lawyer represents the fiduciary generally (*i.e.*, in a representative capacity) when the lawyer is retained to advise the fiduciary regarding the administration of the fiduciary estate or matters affecting the estate. On the other hand, a lawyer represents a fiduciary individually when the lawyer is retained for the limited purpose of advancing the interests of the fiduciary and not necessarily the interests of the fiduciary estate or the persons beneficially interested in the estate.

(5) Arguably, this can and should be worked out and documented at the outset.

The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). ACTEC Commentary on Model Rule 1.2.

d. Former clients. Rule 1.9 of the Model Rules provides that a lawyer may not represent a client in a matter where that client's interests are adverse to the interests of one of the lawyer's former clients in the same or similar matter. Also, a lawyer may not use information from a former representation to the disadvantage of a the former client. The duty of confidentiality clearly extends past the termination of the former representation. Comment to Rule 1.6, above. This is consistent with the general duty of loyalty required of lawyers to their clients. Possible issues here are whether a lawyer can represent a surviving spouse in changing or renouncing an estate plan the lawyer had previously drafted for both spouses, and whether a lawyer who has drafted an estate plan for both spouses may later represent one spouse in a divorce proceeding. *Developments, supra*, at 20.

e. Compensation from another party. Rule 1.8 of the Model Rules and DR 5-107(A)(1) prohibit lawyers from accepting compensation from other parties for representation of a client unless the client consents after consultation; Rule 1.8 explicitly adds the requirements of no interference with the lawyer's independent judgment or the attorney-client relationship, and no breach of confidentiality. The potential for improper interference in the attorney-client relationship by someone paying the tab is obvious.

f. Lawyer as advisor or intermediary. Many conflicts, particularly arising from multiparty representation, are based at least in part on how we view the role of the lawyer. The Model Rules take note of the fact that the role of the lawyer often goes beyond or differs from the standard paradigm of lawyer-as-advocate. Rule 2.1 provides that lawyers may advise their clients, and in doing so may take into consideration relevant moral, economic, social, and political factors. Rule 2.2 provides that a lawyer may act as an intermediary between clients if the clients consent after being fully informed as to the risks and advantages of such a method of proceeding and its effect on the relationships between the parties. The rule requires that the lawyer reasonably believe that such a method of proceeding will be

workable and to the clients' advantage. If problems arise, the lawyer is required to withdraw as intermediary and is prohibited from representing either party in the same matter.

3. *Conflicts between attorney and client.*

a. Fees. Rule 1.5 of the Model Rules provides that a lawyer's fee shall be reasonable, giving some factors helpful in that determination, and that the fee should be communicated to the client, preferably in writing. The Rule also gives some instructions regarding contingent fees and the division of fees between lawyers not in the same firm. The Model Code prohibits "clearly excessive" fees, DR 2-106(A), and also gives some instructions on contingent fees and fee division, DR 2-106(C) and DR 2-107(A). These rules, however, do not directly address most of the fee-related issues confronting the estate planner. Three of these issues are "loss leaders," tax treatment, and the cost/product tradeoff. Also an issue for estate planners is dual fees for dual representation.

(1) "Loss leaders" refers to a practice of estate planning lawyers that was common in the past, i.e., underbilling "front end" legal work with the expectation of being selected to do the more lucrative estate legal work at a later date and possibly recouping any prior losses at that point. Clearly, when there is fee manipulation of any sort, it should be closely examined. An argument can be made that the overall fee is reasonable even if there is some attempt to recoup earlier losses, and that "loss leader" billing technique is not misleading since it is commonplace. Opponents of "loss leaders," on the other hand, claim that the lower front end fee may lead to lower quality estate planning, that it misleads the client as to the attorney's normal fees, and that recoupment is tempting and simply unethical. *Developments, supra*, at 5, citing Casner, *Estate Planning Statesmanship*, 8 U. Miami Inst. on Est. Plan. 12-8 (1974).

(2) Another issue that arises in billing for estate planning services is the client's tax treatment of such charges. The Internal Revenue Code § 212(3) deduction allowed for expenses incurred in connection with tax determination, collection, or refund makes it tempting to seek to write off a large portion of estate planning services when in fact only that portion qualifying as tax planning is deductible. *Developments, supra*, at 5; Treas. Reg. § 1.212-1(1). Also, estate planners are sometimes asked to include estate planning services for corporate officers in with the general corporate billings, a practice that may inflate corporate business expenses with ones personal in nature. *Developments, supra*, at 5-6, citing Casner, *supra*, at 12-9.

(3) A third issue arising in the fee area of estate planning is the propriety of offering the client

short-term savings on estate planning by preparation of a simple will or other unsophisticated plan that does not make use of revocable living trusts and other probate avoidance devices that may save the client money in the long run. *Developments, supra*, at 6.

(4) A final issue is the propriety of charging dual fees when an attorney serves as both fiduciary and attorney. Courts have tended to reduce the attorney's fee in such circumstances, likely reflecting a perception by the court of overlapping duties. The requirement of "reasonable" fees should actually take care of this issue.

b. Attorney as beneficiary. Rule 1.8(c) of the Model Rules states:

A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from the client, including a testamentary gift, except where the client is related to the donee.

The Model Code addresses this topic in EC 5-5, prohibiting a lawyer from "suggest[ing] to his client that a gift be made to himself or for his benefit." The Model Rules clearly have more teeth here since they set forth an almost *per se* rule (with the exception of the qualifier "substantial") and so eliminate the need to show undue influence, which may be difficult even though a drafter/beneficiary situation is likely to attract close scrutiny. See, Levin, *Legal Ramifications of Unethical Estate Planning Practices*, 124 *Trusts & Estates* 47-48 (1985); *Johnston, supra*, at 60-86. One possible issue still open, however, is indirect bequests to a drafting attorney, such as gifts to the attorney's favorite charity. *Price, supra*, at 18-18. In such a case, the disclosure of conflicts requirements in Rule 1.7 and DR 5-101(A) might apply. *Developments, supra*, at 24.

c. Attorney as fiduciary. The lawyer drafting a will or trust has some motivation to have himself or herself named as executor or trustee of the estate since there are often substantial fees to be earned from such service, and the fees are paid out of estate funds. Thus, there is potential for attorneys overreaching here. The Model Rules do not explicitly address this problem, though Rule 1.7, on conflicts, Rule 1.8(a), on business transactions with the client, and Rules 7.1-7.3, on advertising and solicitation, are relevant. EC 5-6 of the Model Code, on the other hand, provides specifically that "[a] lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument." In either case, there is no proscription of the drafting lawyer serving as fiduciary of the estate; the focus instead is on how that appointment comes about. Also relevant are the problems of multiparty representation and, if

the lawyer appoints him or herself as counsel to the estate or trust as well, which he or she will have the power to do as executor, dual fees, which are both discussed below. See, Haught, *Task Force Conducts Study on Attorneys in Fiduciary Roles*, 128 *Trusts & Estates*, April, 1989, p. 14 and February, 1988, p. 10; Brosterhous, *Draft Statement on Principles on Attorneys Acting as Other Fiduciaries*, 128 *Trusts & Estates*, December, 1988, p. 12; Tate, *Handling Conflicts of Interest That May Occur in an Estate Planning Practice*, 16 *Estate Planning* 32, 36 (1989); *Developments, supra*, at 24; *Levin, supra*, at 49-50; *Price, supra*, at 18-19; and *Johnston, supra*, at 86-101. In *State v. Gulbankian*, 54 Wis. 605 (1972), the practice of a lawyer being named a fiduciary in numerous cases, based on the sheer numbers, was found to be unethical.

d. Employment by fiduciary. The drafter also has some motivation to try to secure appointment as lawyer for the fiduciary, again because of the fees generated by the service provided, such fees again being paid out of the estate or trust.

(1) Designation in instrument. One route to appointment as attorney for the estate is explicit designation in the instrument itself. Generally, the designation of the lawyer in the instrument is not binding on the fiduciary. *Price, supra*, at 18-20. Nevertheless, it raises questions of overreaching and solicitation. See, *Developments, supra*, at 26; *Levin, supra*, at 50, 53; and *Johnston, supra*, at 101-12. It has been suggested that because such a clause is unlikely to be requested or challenged by the client, its insertion is a very subtle sort of solicitation and so may be even more deplorable than naming oneself as fiduciary. *Developments, supra*, at 26, citing *Johnston, supra*, at 103.

(2) Corporate fiduciary's policy of naming draftsman as estate attorney. Another route to the estate attorney appointment is through appointment by the corporate fiduciary named in the instrument. At one time corporate fiduciaries had explicit agreements with bar associations to name the drafter of the instrument as estate attorney. Although there are no longer such agreements, since they are subject to anti-trust challenges, the pattern of appointment in many jurisdictions suggests there is at least an informal policy calling for such appointment. *Levin, supra*, at 50, 53. Since this is simply an indirect method to accomplish the same result as naming oneself estate attorney in the instrument, see above, the same concerns apply. Also, there is a concern that the lawyer's judgment as to who would be the best fiduciary for his or her particular client may be affected. See, *Developments, supra*, at 26-27; *Levin, supra*, at 50, 53; and

Johnston, supra, at 115-20. Wisconsin has addressed this by adopting a statute giving beneficiaries 30 days following the appointment of a corporate fiduciary to name an estate attorney, if none was named in the will. Wis. Stat. Ann. §856.31. *Developments, supra*, at 27.

(3) Safekeeping of wills. Safekeeping of clients' wills has in the past been used as a method of securing appointment as estate attorney, the reasoning being that the beneficiaries or fiduciary will have to come to the lawyer to get the will, and so will be more inclined to hire that lawyer because of that contact. This is clearly a subtle form of solicitation. However, safekeeping of a client's will can also be a valuable service to the client. Again, the propriety of the practice will depend on the circumstances. See, *Developments, supra*, at 28; *Johnston, supra*, at 124-33.

4. *Avoidance, Mitigation, Withdrawal.* Where conflicts or other problems arise or are likely to arise, the estate planner has basically three methods of proceeding: avoidance, mitigation, or withdrawal. *Price, supra*, at 18-9. If the lawyer is able to spot the potential for problems ahead of time, he or she can arrange the relationship with the client or client in such a way as to avoid conflicts. Most clearly, the lawyer can simply insist that parties need to have independent representation. Another option is for the lawyer to make clear that he or she is serving as an

intermediary per Rule 2.2, above. Or, the lawyer may inform the clients ahead of time of the risks of multiple party representation, and make clear that he or she must not be the keeper of any intraclient secrets, otherwise independent representation will be necessary. Once a conflict has arisen, if the conflict is not of a serious enough nature to require independent representation, the lawyer may, per Rule 1.7, mitigate the problem by obtaining the client's consent to proceed after full disclosure to the client of the conflict and any possible risk or risks involved in proceeding. The tough call here, of course, is whether the conflict is so serious as to require independent representation. If the determination is made that the conflict is indeed too serious to allow the attorney-client relationship to proceed, withdrawal is required, per Rule 1.16 or DR 2-110. Rule 1.16 and DR 2-110 provide that a lawyer shall withdraw from representation in certain circumstances, the most applicable here being where failure to do so would result in the violation of the Model Rules or the Model Code, respectively. If a lawyer was acting as an intermediary, he or she must withdraw from representation of all parties. If the lawyer was not acting in that special role, however, he or she need only withdraw from representation of enough parties to remove the conflict. *Developments, supra*, at 21, 22.